No. 12198

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

Appellant,

v.

FRED S. RENAULD & CO., Debtor, and GEORGE GARDNER, Receiver of the Estate of FRED S. RENAULD & CO., Debtor,

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

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TABLE OF AUTHORITIES CITED

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ARGUMENT

The appellees have not met the issue before this court on its merits, or at all. They have apparently abandoned their former reliance upon the case of *Barrett and Hilp* v. *California Employment Commission* (Superior Court, San Francisco, No. 341890) which case is not mentioned in the appellees' brief.

In electing to place sole reliance upon the case of *California Employment Commission* v. *Ransohoff's, Inc.* (Appellate Department of the Superior Court, San Francisco No. 1618), they have devised an argument which, in effect, may be stated as

"Since a Superior Court Appellate Department has decided this matter, in a virtually identical case, the courts of the United States are circumscribed, limited and bound by its judgment."

Such an argument erroneously assumes that the *Ransohoff* case constitutes the rule of decision which must be followed in federal court and that it correctly decides the law.

1. The argument ignores the fact that the appellate department of the superior court is not binding authority even in California.

2. It completely evades *Bank of America* v. *Sampsell,* 114 Fed. (2) 211, which disposes of the point with thoroughness. In that case the holding of *In re Wiegand,* 27 F. Supp. 725, was reversed by the Ninth Circuit Court of Appeals, thus setting at naught the reliance of the district judge upon an appellate department ruling despite his generous description of that department as "the little Supreme Court."

3. It entirely sidesteps the effect of the recent United States Supreme Court decision in *King* v. *United Commercial Travelers,* 333 U. S. 153, 92 L. Ed. 609, 68 S. Ct. 488, which destroys in definite terms (appellant's brief, p. 17) the capacity of unreported state court decisions to bind federal courts.

4. It fails even to consider the ruling of the Ninth Circuit Court of Appeals in *Woods et al.* v. *Deck,* 112 F. (2) 739, 742, wherein this court held that it was not bound by the decision of a California superior

court since it was not a decision of the highest court of the State.

5. It disregards the authority of the eighth, sixth and second circuits of the United States Court of Appeals to the same effect as set forth in:

Summers v. *Travelers Insurance Co.,* 109 F. (2) 845;
Anglo American Land Co. v. *Lombard,* 132 F. 721;
U. S. Telephone Co. v. *Central Union Telephone Co.,* 202 F. 66, 69;
Irving National Bank v. *Law,* 9 F. (2) 536.

6. It omits consideration of the statement by the United States Supreme Court in *King* v. *United Commercial Travelers* (supra) that *"The Fidelity Union Trust Company case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions* * * *."

7. While the appellant considers that the *Ransohoff* case was incorrectly decided, does not constitute the rule of decision in this State, and that its capacity to bind this court can adequately be represented only by a zero, it will accomodate the appellees by causing a true copy of this unreported decision to be included in the appendix to this reply brief.

CONCLUSION

It is respectfully concluded and urged that the judgment of the court below was erroneous in disallowing that portion of the tax based upon wages paid by the debtor corporation up to the first $3,000. It is further submitted that the conclusion of the district court that it was bound by the two unreported decisions of the California superior court was erroneous.

Appellant, accordingly, prays that the judgment be reversed and that the tax claim be allowed in full and as filed.

Respectfully submitted.

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE

CITY AND COUNTY OF SAN FRANCISCO

CALIFORNIA UNEMPLOYMENT COMMISSION (formerly Unemployment Reserves Commission),

Plaintiff and Respondent,

vs

RANSOHOFF'S INC., a CORPORATION, et al.,

Defendants and Appellants.

No. 1618
APPELLATE
DEPARTMENT

MEMORANDUM OPINION

The California Employment Commission claims that the employees of Ransohoff's, Inc., a corporation, were employed by two different employers during the year 1940.

It appears that Robert and James Ransohoff were copartners in a business known as Ransohoff's. They jointly managed the business and each owned fifty percent of it.

On August 1st, 1940, the business was changed into a corporation. The brothers Ransohoff each owned fifty percent of the corporate stock and they continued to conduct and manage the affairs of the business in precisely the same manner as under the partnership arrangement. As is usual in such cases, the corporation acquired the entire organization, trade, business, assets and liabilities of the partnership.

Upon completion of the corporate structure the California Employment Commission was duly informed and the corporation assumed the business of the partnership for the purpose of determining its rate of contributions under the terms of the California Unemployment Insurance Act "as if no change with respect to such separate account, actual experience and pay rolls had occurred and with the same effect for such purpose as if the operations" of the business had always been conducted by the corporation. It is to be noted that under the corporation, the positions, salaries due, and other matters having to do with the employees continued as before.

The California Employment Commission sought to collect from the newly formed corporation alleged delinquencies in contributions for the last five months of the year 1940 upon the theory that the corporation was a separate entity. The corporation had paid all contributions except those levied on the wages of employees who received in excess of $3,000. per year. Both appellants and respondent concede the law does not contemplate contributions on wages in excess of $3,000. per annum paid to any one employee by a single employer. The Commission does contend, however, that the employees of Ransohoff's were paid by two different employers during the year 1940, namely, the partnership and the corporation. The lower court upheld this contention and judgment for the plaintiff was entered accordingly.

The question to be determined, therefore, is whether it was the intention of the legislature, as embraced within the Unemployment Insurance Act and particulary Section 41.5 thereof, that Ransohoff's, Inc.,

a Corporation, and successor to Ransohoff's a partnership, be relieved of the obligation of making contributions on wages paid to employees who previously, as employees of Ransohoff's, the partnership, and within the same calendar year received $3,000. in wages.

The California Employment Commission claims that employees of Ransohoff's who received more than $3,000. in 1940, got it from two different employers because the manner of conducting the business was changed on August 1st, 1940, from a partnership to a corporation. The Commission bases its contention on Section 11 (c) 1. 38, 44.2.

The California Unemployment Insurance Act was designed to benefit persons unemployed through no fault of their own. It provides that funds be set aside for systematic application to the general welfare of citizens of the State in order that involuntary unemployment and its resulting suffering be reduced to a minimum. The act is part of a national plan of unemployment reserves and social security. Its beneficial social and economic aspects require no further discussion for the purposes of the case before us.

The Congress and our State legislature eliminated from the social security scheme earnings in excess of $3,000. per year. Therefore, neither an employer nor an employee has to make any contribution on account of earnings above the $3,000. limitation. Accordingly, no benefits are paid upon any excess earnings. (Sec. 38, 44.2, 41, 53, 54).

State unemployment statutes are part and parcel of the federal system. Thus, the provisions in the various state acts appear to be in substantial conformity.

In construing the act we are met, not unexpectedly, by a paucity of precedent and decision. This far-seeing legislation, designed to broaden the scope of private charity and purely local unemployment relief, but recently came into existence.

In the interpretation of particular words, phrases or clauses of a statute, the entire substance thereof or that portion having relation to the subject under review should be looked into to determine the scope and purpose of a particular provision therein of which such words, phrases or clauses form a part. Wallace vs Payne, 197 Cal. 539, 544.

With this cardinal rule of construction in mind, it is difficult for me to follow the reasoning relied upon by counsel for the State.

Section 41.5 of the Act provides that when an employing unit acquires the organization of an employer and continues that organization it is in the exact position of the first employer in so far as the determination of the rate of contribution is concerned.

In the case before us, the only change in the employing unit is one of form and not of substance. There is no change in the nature of the business and the manner of conducting it is the same. The two employers under the corporate structure each owned fifty percent of the stock, just as each of the partners owned fifty percent of the business. The employees presumably are doing the same work.

I do not believe, nor is it urged, that where one business or venture, whether it be corporate in character or otherwise, is succeeded by another the $3,000. limitation must be universally applied. The language of the act, in my opinion, contemplates that given two different employers each should be considered separately. However, I feel that the change

from a partnership to a corporate entity of the employing unit in this case does not create any new employment within the meaning of the act. To hold otherwise appears to me to be contrary to the result which the legislature intended to achieve. It is true that the act refers to "an employer" or "such employer" but this, it would seem, was designed to do nothing more than obviate unnecessary complication in the administration of the law.

Most of the authorities cited by counsel have to do with opinions of Commissions in various States. Although I do not regard the citations as binding upon this court, they are, nevertheless, persuasive and the reasoning appears to be sound.

I am, therefore, of the opinion that a change from a partnership form to a corporate form in this instance is not a real change as contemplated within the terms of the act and that the successor corporation and the predecessor partnership are the same. Accordingly, the judgment of the lower court should be reversed.

Dated: March 10th, 1944.

EDWARD P. MURPHY, Judge.

WE CONCUR:

ROBERT L. MCWILLIAMS, Judge.

FRANKLIN A. GRIFFIN, Presiding Judge.

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